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MEMORANDUM May 2, 2014

To: Senate Budget Committee
Attention: [redacted]

From: [redacted] Legislative Attorney, x[redacted]

Subject: **ACA Risk Corridor Funding for FY2015**

This memorandum responds to your request for an analysis of legislative language proposed to be included in the President's Budget for FY2015 relating to the risk corridor program established under § 1342 of the Patient Protection and Affordable Care Act (ACA).[1] This memo provides general background information, and may be used to respond to questions by other Members or Congressional staff.

Background

Section § 1342 of the ACA requires the Secretary of Health and Human Services (HHS) to establish and administer a program of risk corridors for 2014, 2015, and 2016 for qualified health plans[2] (QHPs) offered to individuals and small businesses.[3] Under § 1342(b)(1), if an insurer's allowable costs exceed the total premiums received (less administrative costs) for a QHP, the Secretary is required to pay the insurer a percentage of the shortfall in premiums. In contrast, under § 1342(b)(2), if a participating insurer's allowable costs are less than the total premiums received (less administrative costs), the insurer is required to pay to the Secretary a comparable percentage of the excess premiums received.

Authority to conduct the risk corridor program has been delegated by the Secretary of HHS to the Administrator of CMS.[4] The President's Budget for FY2015 proposes that the following language be provided in an annual appropriations act for the Centers for Medicare and Medicaid Services (CMS) for FY2015:

[1] The ACA was signed into law on March 23, 2010 (P.L. 111-148, 124 Stat. 119). A week later, on March 30, 2010, the President signed the Health Care and Education Reconciliation Act (HCERA; P.L. 111-152, 124 Stat. 1029), which amended multiple health care and revenue provisions in ACA. Several other bills that were subsequently enacted made more targeted changes to specific ACA provisions. All references to ACA in this memorandum refer to the law as amended.

[2] Qualified health plans are plans that provide a comprehensive set of health benefits and comply with all applicable ACA market reforms. Exchange plans must be QHPs, with limited exceptions. QHPs may also be offered in the private market outside of exchanges.

[3] 42 U.S.C. § 18062.

[4] 76 Fed. Reg. 53903, 53904 (Aug. 30, 2011).

Program Management

> For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $4,199,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until expended: Provided, That all funds derived in accordance with 31 U.S.C. 9701 from organizations established under title XIII of the PHS Act shall be credited to and available for carrying out the purposes of this appropriation: Provided further, That the Secretary is directed to collect fees in fiscal year 2015 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.[5]

The President's Budget for FY2015 also indicates that the administration proposes to use the funds that would be provided under this language to make risk corridor payments under ACA § 1342.[6]

Analysis

With this historical and legal background, you have asked us to answer the following questions, assuming the proposed legislative language from the President's Budget for FY2015 is enacted:

1. Are the amounts received under the risk corridor program available to make payments under the risk corridor program?
2. If payments exceed receipts under the program, can the other amounts provided in the Program Management account be used to make risk corridor payments?
3. If payments are less than receipts under the program, can the excess be used to fund other activities in the Program Management account?

Availability of Risk Corridor Receipts

As noted above, the risk corridor program directs payments to be made by the Secretary of HHS to certain insurers that have underestimated their premiums for a given plan year through 2016. However, statutory and constitutional provisions prohibit federal agencies from making payments in the absence of a valid appropriation.[7] Under longstanding GAO interpretations, an appropriation must consist of both a direction

[5] OFFICE OF MANAGEMENT AND BUDGET, *Appendix, Budget of the United States Government, FY2015*, at 460, available at [http://www.whitehouse.gov/omb/budget/Appendix].

[6] *Id.*

[7] 31 U.S.C. § 1342 ("An officer or employee of the United States Government or of the District of Columbia government may not ... make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law"); U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law").

to pay and a specified source of funds.[8] While the language of ACA § 1342(b)(1) establishes a directive to the Secretary to make such payments, it does not appear to clearly specify a source of funds from which those payments are to be made.[9]

Section 1342(b)(2) does require insurers to make payments to the program if they overestimate annual premiums and consequently experience a windfall. These receipts by the government are not explicitly designated to be deposited in a special account or otherwise made available for outgoing payments under the risk corridor program. In the absence of any specific directions, federal law requires such amounts to be deposited in the General Fund of the Treasury, from which they may be further appropriated by Congress.[10]

It is possible that such an appropriation of the amounts received under the risk corridor program could be found in the legislative language proposed as part of the President's Budget for FY2015, which is quoted above. In relevant part, that language provides that:

> For carrying out ... other responsibilities of the Centers for Medicare and Medicaid Services ... such sums as may be collected from authorized user fees ... which shall be credited to this account and remain available until expended.[11]

As noted above, the authority to establish a risk corridor program under ACA § 1342, including the authority to make payments to insurers under that program, has been delegated to CMS.[12] Therefore, if the amounts received by CMS under the risk corridor program can be characterized as authorized user fees, those receipts would appear to be available to make such risk corridor payments during FY2015 under the appropriation created by this language. There are two theories under which CMS might be considered authorized to impose user fees or charges[13] with respect to the risk corridor program. The first potential source of authority is the Independent Offices Appropriation Act (IOAA), which provides federal agencies with the authority to impose user fees or charges when providing a service or thing of value.[14] The second is the text of ACA § 1342 itself which provides that a participating insurer shall pay a percentage of the excess premiums to the Secretary.[15] If either proposition is accepted, then, under the

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[8] *See* GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-17 (2004).

[9] "[I]f ... a participating plan's allowable costs for any plan year are more than [specified thresholds] the Secretary shall pay to the plan an amount equal to [the statutory formula]." 42 U.S.C. § 18062(b)(1). It should also be noted that the question of whether an appropriation is available to make these payments is separate from the question of whether insurance plans meet the eligibility requirements for a payment under § 1342(b)(1). A qualified health plan may have a legal claim to the payments by operation of the statutory formula, but that alone does not constitute an appropriation from which that claim may be paid. *See* GAO, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-17 (2004) (citing Comptroller General Decision B-114808, Aug. 7, 1979). In contrast, the risk corridor payments under the similar Medicare Part D program are funded through a permanent appropriation from the Medicare Prescription Drug Account established in the Federal Supplementary Medical Insurance Trust Fund. 42 U.S.C. § 1860d-16(b)(1)(B).

[10] 31 U.S.C. § 3302(b). *See* GAO, 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12-93 (2008) (noting that creation of revolving fund is exception to general rule of 31 U.S.C. § 3302(b)).

[11] OFFICE OF MANAGEMENT AND BUDGET, *Appendix, Budget of the United States Government, FY2015*, at 460, available at [http://www.whitehouse.gov/omb/budget/Appendix].

[12] *Supra* footnote 4.

[13] The terms "user fee" and "user charge" are used interchangeably in federal appropriations law. *See* GAO, *A Glossary of Terms Used in the Federal Budget Process*, at 100 (Sept. 2005); and GAO, 3 *Principles of Federal Appropriations Law* 12-143 (Sept. 2008) ("A user fee may be defined as ... "any charge collected from recipients of Government goods, services, or other benefits not shared by the public.").

[14] 31 U.S.C. § 9701.

[15] 42 U.S.C. § 18062(b)(2).

proposed FY2015 language, the amounts received would be appropriately characterized as user fees or charges and those amounts would be available for carrying out the responsibilities of CMS, including the risk corridor program under ACA § 1342.[16]

Availability of Funds to Cover Deficits in Risk Corridor Program

Although, as described above, the amounts collected pursuant to the risk corridor program could be available to make payments to insurers under that program, it is theoretically possible that the amount of payments required to be made under the program will exceed receipts. In the event of such a deficit, there may be questions as to whether the other amounts available in the CMS "Program Management" account could be used as a secondary funding source to make risk corridor payments.

The proposed FY2015 appropriations language for the "Program Management" account identifies several distinct sources of funds:

- $4,199,744,000 transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund as authorized by § 201(g) of the Social Security Act;
- All funds collected in accordance with § 353 of the Public Health Service Act and § 1857(e)(2) of the Social Security Act;
- Funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006;
- Such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until expended;
- All funds derived in accordance with 31 U.S.C. § 9701 from organizations established under title XIII of the PHS Act which shall be credited to and available for carrying out the purposes of this appropriation; and
- Fees in fiscal year 2015 from Medicare Advantage organizations pursuant to section 1857(e)(2) of the Social Security Act and from eligible organizations with risk-sharing contracts under section 1876 of that Act pursuant to section 1876(k)(4)(D) of that Act.

Initially, it should be noted that the use of other available funds to make risk corridor payments under ACA § 1342 would likely reduce the amount of available funds that could be used for other purposes. Nevertheless, for some of these categories, the text of the proposed FY2015 legislative language strongly suggests that they may be used for any of the purposes for which the appropriation was made, including payments under ACA § 1342. For example, fees charged under 31 U.S.C. § 9701 to health maintenance organizations under Title XIII of the Public Health Service Act "shall be credited to and available for carrying out the *purposes* of this appropriation."[17]

In other cases, the text of the proposed FY2015 language is silent, but makes reference to other provisions of law that may provide limits on the purposes towards which such funds may be made available. For

[16] Although either the text of § 1342 or the IOAA may provide sufficient justification to levy user charges under the risk corridor program, which authority is used may have implications regarding the available uses for which receipts under the risk corridor program may be used. *See infra* at "Use of Risk Corridor Surplus for Other Purposes."

[17] OFFICE OF MANAGEMENT AND BUDGET, *Appendix, Budget of the United States Government, FY2015*, at 460, available at [http://www.whitehouse.gov/omb/budget/Appendix] (emphasis added).

example, the transfers from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund are made pursuant to § 201(g) of the Social Security Act. In turn, § 201(g) directs the Trust Funds to pay amounts based on estimates of expenditures for various programs authorized under the Social Security Act. Because the proposed FY2015 language makes the transfer of funds subject to § 201(g), it is likely that those transferred funds would be limited to those purposes specified in § 201(g). If so, then these funds would not be available to make risk corridor payments, as that program is not one of the purposes for which § 201(g) authorizes transfers from the relevant trust funds. Similarly, § 353 of the Public Health Service Act;[18] §§ 1857(e)(2) and 1876(k)(4)(D) of the Social Security Act;[19] and § 302 of the Tax Relief and Health Care Act of 2006[20] authorize collection of fees for specific purposes, and thus such fees would also not appear to be available to fund ACA risk corridor payments.

Use of Risk Corridor Surplus for Other Purposes

In the alternative, it is also possible that receipts under the ACA risk corridor program could exceed payments to insurers. In that event, there may be questions regarding whether such surplus funds could be applied towards other purposes for which the CMS "Program Management" account is appropriated.

The particular clause in the proposed FY2015 language under which receipts from the ACA risk corridor program are appropriated to the CMS "Program Management" account simply states that sums "collected from authorized user fees and the sale of data, ... shall be credited to this account and remain available until expended."[21] This language does not appear to impose any restrictions on how the amounts collected as user fees may be used. Similarly, the language in ACA § 1342 which authorizes the charges to insurers who overestimate premiums does not specify or restrict the purposes for which the amounts received may be used.[22]

User fees imposed under the authority provided in the IOAA generally must be fair and based on the costs to the government and the value of the service or thing being provided.[23] The Supreme Court has suggested that if a user fee was structured so that it was being used to fund general government activities unrelated to the service or benefit being provided, this would more closely resemble a tax and would be outside the scope of the authority conferred by the IOAA.[24] This restriction has also been applied to other statutory authorizations to charge user fees that either explicitly reference the IOAA[25] or are *in pari materia* (*i.e.* have a common purpose as the IOAA).[26] Therefore, if the receipts under the ACA risk corridor program were held to be subject to the requirements of the IOAA, it may not be permissible to use a surplus in the risk corridor program to pay for unrelated activities in the CMS "Program Management" account.

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[18] 42 U.S.C. § 263a (relating to certification and inspection of laboratories).

[19] 42 U.S.C. § 1395w-27(e)(2) (relating to enrollment, dissemination of information, and counseling); 42 U.S.C. § 1395mm(k)(4)(D) (same).

[20] 42 U.S.C. § 1395ddd(h)(1)(C) (reserving amounts retained for recovery audit program).

[21] OFFICE OF MANAGEMENT AND BUDGET, *Appendix, Budget of the United States Government, FY2015*, at 460, available at [http://www.whitehouse.gov/omb/budget/Appendix] (emphasis added).

[22] 42 U.S.C. § 18062(b)(2).

[23] 31 U.S.C. § 9701.

[24] Nat'l Cable Television Ass'n v. U.S., 415 U.S. 336 (1974).

[25] Boat Owners Ass'n v. U.S., 834 F. Supp. 7 (D.D.C. 1993).

[26] Yosemite Park & Curry Co. v. United States, 231 Ct. Cl. 393 (Ct. Cl. 1982).

However, there are several factors which may argue against such a conclusion. First, as noted above, ACA § 1342 arguably provides an independent basis aside from the IOAA upon which risk corridor charges can be levied against insurers. Second, § 1342 does not explicitly reference or incorporate the terms of the IOAA. Third, statutes that have been found to be *in pari materia* with the IOAA generally have spoken of reimbursement or recovery of costs, neither of which is present in § 1342.[27] Assuming that the IOAA does not apply, either explicitly or by implication, then the lack of any other restriction in the proposed FY2015 legislative language or the terms of § 1342 itself would suggest that surplus amounts received under the ACA risk corridor program, if any, could be used to fund other activities in the CMS "Program Management" account.

[27] *See*, *e.g.*, *Id.*; Alyeska Pipeline Service Co. v. United States, 224 Ct. Cl. 240 (Ct. Cl. 1980); First Nat'l Bank v. Smith, 445 F. Supp. 1117 (D. Minn. 1977).